In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

No. [redacted] 17

W[illegible] AGRICULTURAL COMPANY, LTD.
([illegible] Canadian corporation),
Petitioner and Cross-Respondent,

E[illegible] B. P. CHRISTIAN, an incompetent
[illegible] by HERMAN V. VON HOLT, her
Respondent and Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Encyclopedias and Notes

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1937

No.

WAIALUA AGRICULTURAL COMPANY, LTD.
(an Hawaiian corporation),
Petitioner and Cross-Respondent,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian,
Respondent and Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your cross-petitioner, Eliza R. P. Christian, an incompetent person, by Herman V. Von Holt, her guardian, for the purpose of saving the points made herein in the

event certiorari is granted upon the petition of the cross-respondent Waialua Agricultural Company, Ltd. (hereinafter referred to as Waialua), respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the decree of said Court of Appeals entered in the above entitled cause December 9, 1937, reversing a judgment and decree of the Supreme Court of Hawaii and remanding said cause to said Court for further proceedings. A petition of the cross-respondent Waialua for a rehearing was denied February 1, 1938.

STATEMENT OF THE MATTER INVOLVED.

This suit was commenced in 1928 in the Circuit Court of Hawaii at Chambers by the cross-petitioner, then forty-three years of age, acting through her duly appointed guardian, and the complaint as amended (R. 339) sought:

(a) to set aside as to her:

(1) a lease made in 1905,

(2) an instrument made in 1906 now construed to be an assignment of rents under said lease, and

(3) a deed made in 1910; and

(b) to recover the reasonable rental value of the land covered by the deed.

All these documents relate to her undivided one-third interest in 14,000 acres of land situated in the Territory of Hawaii. The ground upon which the suit was founded was that at the date of the execution of each of the instruments the cross-petitioner was mentally incompetent. She offered to make such restoration as the Court might

deem just. (R. 357-8 and 366.) The lease of 1905 was made directly to Waialua. The assignment of rents of 1906 was made originally to another, and thereafter and through the deed of 1910, in which the assignee joined, was transferred to Waialua. The deed of 1910 was made to a nominee of Waialua and Waialua has ever since the date thereof retained the beneficial ownership of the land, although legal title has been transferred to different nominees (R. 1061) until 1921, when legal title was taken by Waialua. (R. 1589.)

The trial Court, in 1929, entered a decree in favor of the cross-petitioner (R. 186), whereupon Waialua took an appeal to the Supreme Court of the Territory of Hawaii, which latter Court rendered an opinion (R. 202, 31 Hawaii 817) and remanded the cause for additional evidence (R. 326), which was taken and a second decree entered in 1932 in favor of the cross-petitioner. (R. 533.) The trial Court found that the cross-petitioner was incompetent at the time each of the documents was executed; that she was a "congenital imbecile" (R. 476) and gave judgment for the cross-petitioner, cancelling the lease of 1905, the assignment of 1906, and the deed of 1910, and awarded the cross-petitioner a money judgment as of September 6, 1932, in the net sum of $606,785.75 for the use and occupation of her property by Waialua to that date, after deducting the consideration paid for the deed, with interest thereon at 6% per annum. Waialua took a second appeal to the Supreme Court of Hawaii, which rendered an opinion (R. 550, 33 Hawaii 34) affirming the trial Court's judgment cancelling the deed, but—one of the three justices dissenting (R. 589)—reversing it with respect to the cancellation of the lease of 1905, the cancellation of

the assignment of 1906, and the money judgment for rents, and entered a decree accordingly. (R. 631.) The finding of the trial Court that the cross-petitioner was incompetent during the whole of her life, a "congenital imbecile", was not disturbed; it was confirmed. (R. 552.) Both parties appealed to the United States Circuit Court of Appeals for the Ninth Circuit. (R. 778, 806.) That Court, on December 9, 1937, rendered its decision upon the two appeals (R. 1586, 93 Fed. (2d) 847; supplemental opinion denying a rehearing. R. 1633), in which it (a) confirmed the finding of congenital imbecility in 1910, (b) affirmed the cancellation of the deed of 1910 on the ground of incompetency coupled with the ability of the cross-petitioner to restore Waialua to *status quo*, (c) directed a remand to the trial Court to take such evidence as it deemed appropriate to enable it to make a finding on the issue of competency in 1905 and 1906, and also to fix the amount of the allowance for improvements as hereafter discussed, (d) ordered the entry of a judgment cancelling both the lease of 1905 and the assignment of 1906 if the trial Court should find upon said remand that the cross-petitioner was incompetent at both of those dates, (e) directed, as a condition to the cancellation of the deed, the return of the consideration paid by Waialua therefor, with interest, and also (in the event of the cancellation of the lease, which contains a provision that upon its termination in 1930 the improvements placed on the land should become the property of the landlord) that an allowance be made to Waialua in the amount by which the land has been enhanced in value by the addition of improvements, not, however, to exceed the cost thereof. A decree was entered accordingly. (R. 1628.)

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. In requiring as a condition to the cancellation of the deed that the cross-petitioner restore the consideration and make an allowance for the improvements, the Court has decided an important question of general law in a way probably in conflict with the weight of authority since:

(a) The burden was upon Waialua to prove that it was an innocent purchaser and it failed so to do.

Curtis v. U. S. (1923), 262 U. S. 215, 67 L. Ed. 956;

Wright-Blodgett Co. v. U. S. (1915), 236 U. S. 396, 59 L. Ed. 637;

Treat v. Rogers (C. C. A. 8—1929), 35 F(2d) 77.

Unless Waialua acquired the property without knowledge of the incompetency, restoration is not required as a condition to cancellation.

Elder v. Schumacher (1893), 18 Colo. 433, 33 Pac. 175;

Studabaker v. Faylor (1907), 83 Ind. 747, 80 N. E. 861, 170 Ind. 498, 83 N. E. 747;

Amos v. American Trust etc. Bank (1906), 221 Ill. 100, 77 N. E. 462;

Fecht v. Freeman (1911), 251 Ill. 84, 95 N. E. 1043;

Beckwith v. Cowles (1912), 85 Conn. 567, 83 Atl. 1113;

Hardy v. Dyas (1903), 203 Ill. 211, 67 N. E. 852;

Schindler v. Parzoo (1908), 52 Ore. 452, 97 Pac. 755.

See also:

Bethany Hospital Co. v. Philippi (1910), 82 Kan. 64, 107 Pac. 530;

Thrash v. Starbuck (1896), 145 Ind. 673, 44 N. E. 543.

9 *C. J.* 1216, Sec. 108, footnote 94.

This rule is recognized by the Circuit Court of Appeals in this case (R. 1600), but it did not consider its effect when coupled with the further rule that the burden of proving good faith was upon Waialua.

In its first and second answers filed in 1928 and 1929, respectively (R. 64, 101), Waialua did not plead that it was an innocent purchaser. In its third answer (R. 409) filed in 1931, after the trial in which the invalidity of the deed was decided and before the trial on the remand from the Supreme Court of Hawaii with respect to the lease and assignment, it did so plead, but it did not offer any proof thereof. The finding of the trial Court was "that it is not clearly shown that Waialua Company had actual notice of the incompetency" (R. 154); the Court stated that it "proceeded on the assumption that Waialua was ignorant of her real mental status. But this fact does not justify the conclusion that the Company was a 'subsequent grantee' or an 'innocent purchaser'." (R. 154.) The Supreme Court of Hawaii, in its second opinion, stated that Waialua did not have knowledge of the incompetency. (R. 555.) The United States Circuit Court of Appeals assumed for the purpose of its decision that Waialua did not have knowledge of the incompetency. (R. 1637.) There is no evidence in the record from which a finding that Waialua did not have knowledge of the incompetency can be made. Waialua failed to sustain its

burden of proof and the finding on the issue should have been against it.

Golson v. Dunlap (1887), 73 Cal. 457, 14 Pac. 576;
Campbell v. Buchman (1874), 49 Cal. 362;
64 *C. J.* 1258.

The decree of the United States Circuit Court of Appeals herein that the cross-petitioner should, as a condition to cancellation of the deed, restore the consideration given therefor and make an allowance for the value of the improvements, decides the question of the burden of proof contrary to the rule announced by this Court in *Curtis v. United States,* supra, and in *Wright-Blodgett Co. v. United States,* supra.

(b) The record shows affirmatively that Waialua, through its agent J. R. Holt, had knowledge of the incompetency, and accordingly restoration is not a requisite to cancellation. As admitted by the answer (R. 65-66), Waialua engaged J. R. Holt to acquire the property in its behalf. Waialua stipulated that it was the real party in interest. We quote the record (R. 1061):

"(Counsel for Waialua then admitted that the purchase of May 2, 1910, was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the respondent no different status than it had by virtue of the deed of May 2, 1910 (Ex. A-21) * * *."

Holt was Waialua's dummy in the transaction. (R. 148, 155, 473, 482.) The trial Court found that Holt had knowledge of the incompetency of the cross-petitioner (R. 481-

482, 492) and the finding is not questioned by either the Supreme Court of Hawaii or the United States Circuit Court of Appeals. Holt's knowledge as agent is imputed to Waialua.

Curtis v. U. S. (1923), 262 U. S. 215, 67 L. Ed. 956;
Harrington v. U. S. (1871), 78 U. S. 356, 20 L. Ed. 157;
McCaskill Co. v. U. S. (1910), 216 U. S. 504, 54 L. Ed. 590;
U. S. v. Cooksey (C. C. A. 9, 1921), 275 Fed. 670;
Veazie v. Williams (1849), 8 How. 134, 12 L. Ed. 1018.

It is plain that every advantage was taken, by Waialua, of the condition and necessities of cross-petitioner to make the purchase at a price which the trial Court did not consider adequate. (R. 139-157.)

(c) The rule of decision in the Federal Courts is that a contract of an incompetent is void without regard to the good faith of the other contracting party; and accordingly restoration is not a requisite to relief therefrom.

Dexter v. Hall (1873), 82 U. S. 9; 21 L. Ed. 73;
Kendall v. Ewert (1922), 259 U. S. 139, 66 L. Ed. 862;
Plaster v. Rigney (C. C. A. 8, 1899), 97 Fed. 12.

The rule prevailing in the Federal Court is the rule of decision in this case arising in the Territory of Hawaii.

Kapiolani Estate v. Atcherley (1913), 21 Haw. 441;
Territory v. Ho Me (1922), 26 Haw. 331;
Colburn v. U. S. F. & G. Co. (1920), 25 Haw. 536;

Hill v. Carter (C. C. A. 9, 1931), 47 Fed. (2d) 869 (Cert. den., 284 U. S. 625);

Pyeatt v. Powell (C. C. A. 8, 1892), 51 Fed. 551;

Successors of Fantanzzie v. Municipal Assembly (C. C. A. 1, 1924), 295 Fed. 803.

(d) With respect to the consideration paid by Waialua for the deed, i.e., $30,000.00, the Supreme Court of Hawaii, on the first appeal, found that the cross-petitioner never received the money. (R. 294, 301.) This finding stands undisturbed. Restoration of the consideration is not a condition to cancellation when the incompetent has not received the same.

Jordan v. Kirkpatrick (1911), 251 Ill. 116, 95 N. W. 1079;

Hughes v. Cream (1929), 178 Minn. 545, 227 N. W. 654;

34 A. L. R. 1403;

46 A. L. R. 416, at 429;

95 A. L. R. 1442, at 1446.

This point is recognized by the Circuit Court of Appeals in discussing the general principles governing the cancellation of incompetents' contracts (R. 1603), but the Court did not consider the effect of the rule in the instant case.

(2) In remanding the suit for a determination of the issue of competency in 1905 and in 1906, when the lease and assignment, respectively, were executed, the United States Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as

to call for an exercise of this Court's power of supervision. There have been two trials (R. 111, 163, 472), two appeals to the Supreme Court of Hawaii (R. 202, 547), and two appeals to the United States Circuit Court of Appeals (52 F. (2d) 847 and R. 1586) in this suit. The trial Court found that the cross-petitioner was "both before and at the time of the conveyance * * * and ever since has been and still is incompetent to the extent of having been incapable of understanding and acting in the ordinary affairs of life * * *." (R. 136); that she "has never been competent mentally to execute a conveyance of property" (R. 157); that she "was incompetent during the entire period from and before 1910 to date." (R. 157.) The Supreme Court of Hawaii, on the first appeal, confirmed this finding, saying (R. 273):

> "The overwhelming weight of the evidence requires us to find, and we do find, that on May 2, 1910, Eliza Christian was and at all times has been mentally incompetent to execute a deed or to understand its purpose or effect, or to engage in any business transaction of consequence. She was feeble-minded. Born in 1885, in May, 1910 she had the mentality of a child of not more than five or six. * * * In short, we find that at the date of the deed she was a congenital imbecile."

The Supreme Court of Hawaii was of the view that the validity of the lease and assignment had not been at issue in the first trial (R. 323, 324) and remanded the cause (R. 326) to the trial Court for the taking of additional testimony, touching the circumstances surrounding the execution of these documents, excluding, however, the

question of competency. The evidence on the question of competency at the first trial had covered the whole of the cross-petitioner's life. It is reviewed at length by the trial Court (R. 116 to 134) and by the Supreme Court on the first appeal. (R. 202 to 273.) The latter Court, in its opinion, considered the evidence by periods of the cross-petitioner's lifetime, and one of these periods, from 1902 to 1906, covers the very time during which the lease and the assignment were executed. (R. 220.) That Court concluded from all of the evidence that she was a "congenital imbecile." (R. 273.)

In limiting the remand the Supreme Court clearly believed the evidence and the findings adequate on the question of competency in 1905 and in 1906, for otherwise it would have directed a determination of that issue. At the trial on the remand the trial Court followed the direction of the Supreme Court and refused to hear additional testimony on the question of competency. (R. 1477.) The trial Court said, in its opinion on the remand, "Hearings were had in which it was ruled that the congenital imbecility of petitioner had been found heretofore both by this Court and the Supreme Court and would not be reopened" (R. 476), and again, in discussing the lease of 1905, "Eliza Christian was at all times a congenital imbecile, incompetent to enter into a contract of such a character * * *." (R. 491.) The Supreme Court on the second appeal confirmed the trial Court's interpretation of the remand order (R. 552), and again concluded that she was a "congenital imbecile." (R. 552.) The Supreme Court then proceeded to deny relief against the assignment and the lease, regardless of the incompe-

tency of the cross-petitioner. As the opinion of the Circuit Court of Appeals declares (R. 1618), 116 witnesses have already testified on the issue of competency, touching the whole of the petitioner's life. It is beyond question that one who is a congenital imbecile in 1910 cannot be competent in 1905 or 1906, and all three Courts concur on the finding of congenital imbecility.

The limitation in the order of remand by the Supreme Court of Hawaii to exclude further evidence on the issue of competency was well within its power. (Revised Laws of Hawaii 1935, Sec. 3503.) Having once made that order, it became the law of the case in so far as that Court was concerned.

Thompson v. Maxwell etc. (1897), 168 U. S. 451, 42 L. Ed. 539.

The statement of the Supreme Court of Hawaii, on the second appeal, that it thought it erred in restricting the evidence (R. 553) does not lessen the finality of its first order. The Circuit Court of Appeals was, of course, in no way bound by the limitation of the remand order if it believed that the Supreme Court of Hawaii had abused its discretion in so limiting the evidence. A reading of the opinion of the Circuit Court of Appeals directing a remand on this issue is, we believe, most convincing that that Court does not believe that there is any deficiency in the evidence on the question of competency in 1905 and 1906. The Circuit Court of Appeals, we submit, fell into error in concluding that there was no finding on that issue. There was, as we have quoted from the record, an adequate finding, but if there were not, the

record is sufficiently complete and convincing to warrant a finding by your Honorable Court that the petitioner, having been found to be a "congenital imbecile" in 1910, was also incompetent in 1905 and 1906.

If, in truth, the Supreme Court of Hawaii was in error in limiting the order of remand, we respectfully submit that it was harmless error and should not necessitate a reversal of the trial Court's decree that the lease and assignment are both invalid. (28 U. S. C. A. Sec. 391.) Any new evidence will be merely cumulative. 116 witnesses on an issue resulting in a finding of congenital imbecility should be enough.

Drumm-Flato Com. Co. v. Edmission (1908), 208 U. S. 534, 52 L. Ed. 606, 609;

Berio v. Gay (C. C. A. 1, 1921), 272 Fed. 404, 409;

Johnsonburg Vitrified Brick Co. v. Yates (C. C. A. 3, 1910), 177 Fed. 389, 391;

Pochahontas C. C. Co. v. Johnson (C. C. A. 4, 1917), 244 Fed. 368, 374 (Cert. den. 245 U. S. 658, 62 L. Ed. 535);

Mountz v. Apt (1911), 51 Colo. 491, 119 Pac. 150, 151-2.

Had Waialua not petitioned for certiorari we would have been content to accept the judgment of the Circuit Court of Appeals, even though we consider that cross-petitioner should have been given greater relief. Since Waialua has sought certiorari, however, we are compelled to file this cross-petition to preserve the points which

we have made in it and which would, if sustained, enlarge petitioner's recovery.

Alexander v. Cosden Pipe Line Co. (1934), 290 U. S. 484, 78 L. Ed. 452;

Lloyd Sabaudo etc. v. Elting (1932), 287 U. S. 329, 77 L. Ed. 341.

Dated, San Francisco, California,
March 25, 1938.

Respectfully submitted,

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Charles M. Hite,

Attorneys for Cross-Petitioner.

E. D. Turner, Jr.,
Charles E. Finney,
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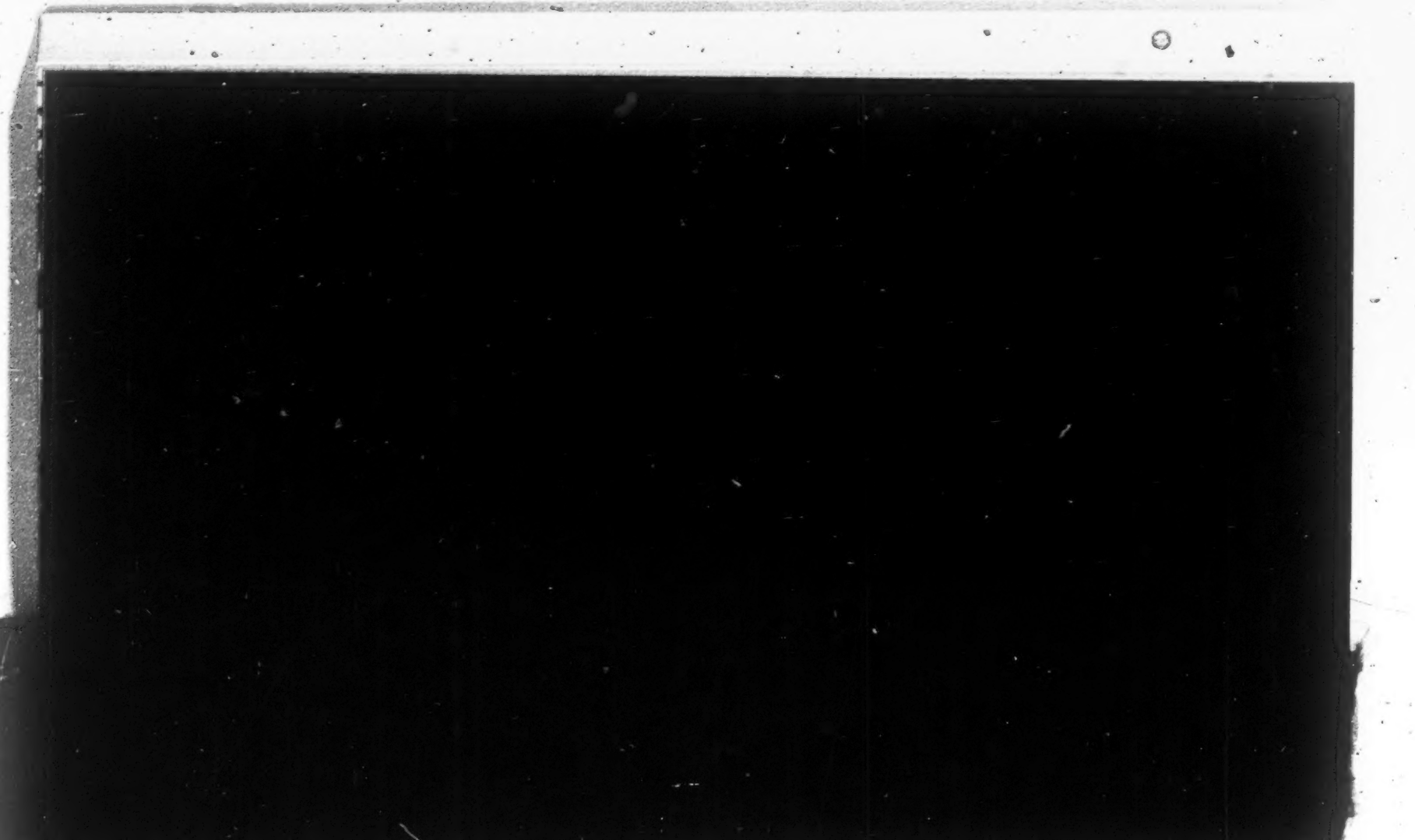
Of Counsel.

(Appendix Follows.)



Appendix

No supporting brief is being filed. The matters required to be included in a brief under Rules 26 and 27, so far as applicable to the case, are contained in the petition or this appendix, as follows:

(a) The index and table of cases and text books cited appear at page i;

(b) The reference to the official report of the opinions delivered by the Courts below appears at pages 3 and 10 for the decisions of the Supreme Court of Hawaii, and at page 4 for the decision of the United States Circuit Court of Appeals:

(c) 1. The jurisdiction of this Court is invoked under the United States Code, Title 28, Section 347;

2. The date of the decree of the United States Circuit Court of Appeals, which petitioner seeks to have reviewed, appears at page 2, and the date of the denial of the petition of the cross-respondent Wajalua for a rehearing appears at page —.

(d) A statement of the case appears at pages 2 to 5 of the petition, under the heading "Statement of the Matter Involved", and to avoid duplication is not repeated;

(e) Errors intended to be urged are those specified at pages 5 and 9 of the petition, under the heading "Reasons Relied Upon for the Allowance of the Writ";

(f) The argument, in summary form, is included in support of the errors relied upon under the heading "Reasons Relied Upon for the Allowance of the Writ", appearing at pages 5 to 14 of the petition. For the sake of brevity we do not repeat it.